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IN THE

Supreme Court of the United States

October Term, 1962

No. 992

FRANK LAINO,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FOURTH JUDICIAL DEPARTMENT

APPELLANT FRANK LAINO'S REPLY TO MOTION TO DISMISS

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Respondent,* in a consolidated motion to dismiss directed against the separate jurisdictional statements of this appellant, Frank Laino, and the appellant Joseph N. Bollettieri, seeks to dismiss the appeal of the appellant Frank Laino on the sole ground that the latter's appeal does not present substantial federal questions. Respondent tacitly concedes that appellant Laino has fully preserved the federal questions sought to be reviewed by specifically excluding appellant Laino from that branch of respondent's con-

* Appellant Laino, having used the term "respondent" in his jurisdictional statement continues to use that term here, albeit in the Motion to Dismiss the term "appellee" is used.

solidated motion to dismiss which argues that the appellant Bollettieri failed below to raise or preserve the issues now presented to this Court.

Accordingly, since the respondent does not contest the fact that the appellant Laino has fully preserved the federal questions raised on this appeal, for review by this Court, appellant Laino will concern himself solely with the single contention raised in the motion to dismiss against his appeal, to wit: that, in the opinion of the respondent, the appeal of the appellant Laino does not present substantial federal questions.

The Federal Questions Raised by Appellant Laino Are Substantial

It must be stated, at the outset, that appellant Laino is not in accord with the rather conclusory statement of fact set forth in the respondent's motion to dismiss. Indeed, respondent appears to have touched so heavily upon what it conceives the facts to be as to have had little time to do more than beg the question with respect to the federal questions prescribed in appellant Laino's jurisdictional statement.

Essentially, respondent takes the position that appellant Laino presents no substantial federal question because, as the respondent postulates, the appellant Laino "voluntarily" waived his privilege against self-incrimination and "voluntarily" gave testimony before the Grand Jury under the limited waiver prescribed by Section 103-b of the General Municipal Law (Respondent's Motion to Dismiss, pages 21, 27). This, however, clearly begs the question. Appellant has persistently urged that his testimony before the Grand

Jury under the "limited waiver" prescribed in the said statute was not voluntary, particularly with respect to the testimony exacted from him on his second appearance before the Grand Jury at a time when he already had been effectively deprived of any eligibility for the public contract in question and when, indeed, he had already clearly demonstrated that he was not giving voluntary testimony on the second appearance before the Grand Jury, by moving to quash the subpoena compelling his further appearance and testimony at a time when the permissible legislative purposes of Section 103-b could no longer be served. The inquisitor on this second compelled appearance, indeed, advised the appellant that, in plain effect, he had no choice but to testify as he had already waived his right against self-incrimination (Tr. 291-293).

The basic premise of the respondent's motion to dismiss, accordingly, is hardly one which can be accepted without further and more detailed argument before this Court. The very basis of appellant's appeal is that his further testimony before the Grand Jury under the so-called "limited waiver" was not voluntary and it ill behooves the respondent, under the circumstances outlined in this appellant's jurisdictional statement, to treat, almost with a casual air, this issue as being so without merit as to form the basis for an argument that there is nothing of substance for this Court to review.

If the appellant Laino is not astray in his position that further self-incriminating testimony before a Grand Jury cannot be compelled (under a "limited waiver" executed pursuant to a statute such as Section 103-b of the General Municipal Law of the State of New York), and also be used to convict the particular witness, where the permissible

legislative purposes of the statute could no longer realistically have been served, then there is a very substantial federal question, indeed, which ought to be reviewed. The question touches not only the basic precepts of the equal protection clause of the Fourteenth Amendment but directly raises the very substantial federal question as to whether, at this period of judicial evolution, the privilege against self-incrimination under the Fifth Amendment to the United States Constitution is not properly applicable to the States by absorption into the Fourteenth Amendment. Certainly, the dangers inherent in the use of a statute such as Section 103-b of the General Municipal Law, in the manner validated below, require a careful scrutiny by this Court and a decision which will act as a future guide line throughout the nation.

We submit that these are very substantial federal questions indeed.

CONCLUSION

It is respectfully submitted that the appellant Laino has raised very substantial federal questions which ought to be reviewed by this Court and that, in any event, the respondent has failed to establish sufficient grounds in its motion to dismiss to sustain the granting of that motion at this point.

Respectfully submitted,

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